

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS; TEXAS  
COMMISSION ON  
ENVIRONMENTAL QUALITY;  
PUBLIC UTILITY COMMISSION  
OF TEXAS; LUMINANT  
GENERATION COMPANY,  
L.L.C.; BIG BROWN POWER  
COMPANY, L.L.C.; LUMINANT  
MINING COMPANY, L.L.C.; BIG  
BROWN LIGNITE COMPANY,  
L.L.C.; LUMINANT BIG BROWN  
MINING COMPANY; L.L.C.;  
SOUTHWESTERN PUBLIC  
SERVICE COMPANY; COLETO  
CREEK POWER, L.P.; NRG  
TEXAS POWER, L.L.C.; NUCOR  
CORPORATION,

Petitioners,

v.

No. 16-60118

UNITED STATES  
ENVIRONMENTAL  
PROTECTION AGENCY and  
ANDREW WHEELER, in his  
official capacity as Administrator,  
United States Environmental  
Protection Agency,

Respondents.

**RESPONDENTS' STATUS REPORT ON REMAND**

On March 22, 2017, the Court entered an Order in which it granted EPA's motion for a partial voluntary remand and remanded the final rule challenged in this case to EPA. On April 7, 2017, the Court granted EPA's unopposed motion to modify the time intervals for status reports on remand to 60 days. EPA now respectfully submits this Status Report on Remand.

1. These cases concern EPA's final action under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, titled: "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze" ("Final Rule"). The Final Rule was published at 81 Fed. Reg. 296 (Jan. 5, 2016).

2. As EPA explained in previous status reports, the initial significant action EPA will take on remand is to publish a notice of proposed rulemaking proposing to reconsider certain aspects of the Final Rule pertaining to the CAA's reasonable progress requirements. *See* 42 U.S.C. § 7607(d)(7)(B). As EPA has also previously explained,

before addressing the reasonable progress requirements, EPA's intent has been to first finalize action on the related but separate CAA Best Available Retrofit Technology ("BART") requirements.

3. EPA's BART final rule was published in the Federal Register on October 17, 2017. 82 Fed. Reg. 48,324 (Oct. 17, 2017). However, EPA's BART final rule has been challenged in this court in *Nat'l Parks Conservation Ass'n, et al. v. EPA*, Case No. 17-60828 (5th Cir.). The petitioners in that case have also filed an administrative petition with EPA requesting that EPA reconsider the BART final rule. This Court has held that case in abeyance pending the resolution of the petition for reconsideration and the completion of any reconsideration process.

4. On April 30, 2018, EPA announced its intention to convene a new rulemaking proceeding to solicit public comment on certain aspects of the BART final rule. On August 27, 2018, EPA published a notice of proposed rulemaking proposing to affirm its October 17, 2017 BART final rule. 83 Fed. Reg. 43,586 (Aug. 27, 2018) ("August 2018 BART proposal"). EPA received approximately 1,500 comment letters and emails from citizens, environmental groups, industry and States.

5. On November 14, 2019, EPA published in the Federal Register a supplemental notice of proposed rulemaking. 84 Fed. Reg. 61,850 (Nov. 14, 2019) (“November 2019 BART supplemental proposal”). EPA held a public hearing on December 9, 2019, and provided a 60-day public comment period, which ended on January 13, 2020. EPA continues to expect to take final action on the BART requirements in the first half of 2020.

6. EPA continues to believe that the resolution of BART requirements in Texas will bear on the scope and nature of the reasonable progress requirements in the January 2016 Final Rule on remand in this case.

7. Accordingly, agency proceedings on remand are ongoing and this case should therefore remain in abeyance.

8. EPA’s next 60-day status report is due to be filed on or before July 27, 2020.

Dated: May 26, 2020

Respectfully submitted,

/s/ Samara M. Spence

Samara M. Spence

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Environmental & Natural Resources

Division

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**CERTIFICATE OF SERVICE**

I hereby certify that the above status report was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: May 26, 2020

/s/ Samara M. Spence  
Samara M. Spence  
*Counsel for Respondent*